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[REDACTED]

**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

DECISION ON REHEARING

CWA/155639

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**PRELIMINARY RECITALS**

Pursuant to a petition filed February 21, 2014, under Wis. Admin. Code §HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance (MA) the matter was set for a hearing. The parties agreed that they wished a legal issue be decided on briefs prior to a hearing. The parties submitted those briefs according to an agreed upon schedule and a decision was issued on July 18, 2014. Subsequently the petitioner requested a rehearing, which was granted, and a hearing was held on October 08, 2014, at Milwaukee, Wisconsin.

The issue for determination is whether the IRIS agency correctly denied petitioner's request for an additional 17.5 Supportive Home Care (SHC) hours.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

Petitioner:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Petitioner's Representative:

[REDACTED]  
[REDACTED]  
[REDACTED]

Respondent:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, Wisconsin 53703

By: Attorney Jessica Hutson Polakowski  
Reinhart Boerner Van Deuren s.c.  
22 E. Mifflin Street  
Suite 600  
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Waukesha County. He lives at home with his parents and two brothers.
2. The petitioner, age 33, has diagnoses that include blindness, brain injury (Intracranial Injury), generalized convulsive epilepsy, osteoporosis, GERD, CVA, and severe mental retardation.
3. The petitioner has been enrolled in the IRIS program since 8/1/09 and has an Individualized Support and Service Plan (ISSP). His current ISSP authorizes payments for his care, and includes 14.5 hours of supportive home care (SHC), 9.5 hours of Self Directed Personal Care (SDPC) and 2.3 hours of respite, daily. Exhibit 1.
4. At some point in 2013, during this enrollment, petitioner requested that the IRIS program fund an additional 17.5 Supportive Home Care (SHC) hours.
5. On January 8, 2014 the IRIS agency issued a notice of action to petitioner stating that it was denying the request for additional SHC. Petitioner appealed therefrom.

## DISCUSSION

The Include, Respect, I Self-Direct (IRIS) program was developed pursuant to a Medical Assistance waiver obtained by the State of Wisconsin, pursuant to section 6087 of the Deficit Reduction Act of 2005 (DRA), and section 1915(j) of the Social Security Act. This Section 1915(c) waiver document is available at <http://www.cms.gov/MedicaidStWaivProgDemoPGI/MWDL/list.asp>. IRIS is a fee-for-service, self-directed personal care program.

The federal government has promulgated 42 C.F.R. §441.450 - .484 to provide general guidance for this program. Those regulations require that the Department's agent must assess the participant's needs and preferences, and then develop a service plan based on the assessed needs. *Id.*, §441.466. The service plan may include homemaker services and "other services" allowed by the state agency. *Id.*, §440.180(b). Further, "all of the State's applicable policies and procedures associated with service plan development must be carried out ..." *Id.* §441.468. Petitioner's service plan, called the ISSP, authorizes payments for 14.5 hours daily of supportive home care (SHC), 9.5 hours of Self Directed Personal Care (SDPC) and 2.3 hours of respite. Exhibit 1. Petitioner has now requested an additional 17.5 hours of SHC and that is the subject of this decision.

In the IRIS program, SHC includes the following, per policy:

### **Supportive Home Care**

Supportive Home Care (SHC) is the provision of a range of services for participants who require assistance to meet their daily living needs, ensure adequate functioning in their home, and permit safe access to the community.

Supportive home care services include:

1. Personal Services
  - a. Assistance with activities of daily living such as eating, bathing, grooming, personal hygiene, dressing, exercising, transferring, and ambulating
  - b. Assistance in the use of adaptive equipment, mobility, and communication aids
  - c. Accompaniment of a participant to community activities
  - d. Assistance with medications that are ordinarily self-administered
  - e. Attendant care

- f. Supervision and monitoring of participants in their homes, during transportation (if not done by the transportation provider), and in community settings
- g. Reporting of observed changes in the participant's condition and needs
- h. Extension of therapy services. "Extension of therapy services" means activities by the SHC worker that assist the participant with a Physical Therapy/Occupational Therapy or other therapy/treatment plan. Examples of these activities include assistance with exercise routines, range of motion exercises, standing by during therapies for safety reasons, having the SHC worker read the therapist's directions, helping the participant remember and follow the steps of the exercise plan, or hands on assistance with equipment/devices used in the therapy routine. It does not include the actual service the therapist provides.

## 2. Household Services

- a. Performance of household tasks and home maintenance activities, such as meal preparation, shopping, laundry, house cleaning, simple home repairs, snow shoveling, lawn mowing and running errands
- b. Assistance with packing/unpacking and household cleaning/organizing when a participant moves

Excludes services available through the Medicaid State Plan. Excludes training provided to a participant intended to improve the participant's ability to independently perform routine daily living tasks, which may be provided as daily living skills training. This service may not duplicate any service that is provided under another waiver service definition. This service excludes "Live-In Caregiver" services, as this is a separate service type.

Available at [http://www.tmg-wis.com/iris/docs/addinfo/waiver\\_def.pdf](http://www.tmg-wis.com/iris/docs/addinfo/waiver_def.pdf).

SHC is meant to ensure that a person receives the services needed to allow him to remain in the community and out of a nursing home. Because the petitioner requests a change in the hours allowed and is seeking to change the *status quo*, he must prove by the preponderance of the credible evidence that the additional supportive home care hours are needed to meet his medical needs. He has not shown that he requires an additional 17.5 hours of SHC. Instead, what his representatives have attempted to show is that the additional hours were requested so that they can hire more caregivers for petitioner. In particular, his mother testified that she does not want her other two sons to continue to perform free, natural supports. Because these additional requested benefits are for petitioner, and not his caregivers, this is not a legitimate reason to increase the hours. His mother also testified that, essentially, she wants 2:1 staffing for petitioner every 24 hours. This is due, in large part, to petitioner's seizures. As described in petitioner's SDPC plan, petitioner does receive 2:1 SDPC for tasks such as bathing, dressing, grooming, eating and toileting, every day, for 2 hours. The agency agreed at hearing that 2:1 staffing could be allowable for time during car rides, but that the request for the additional SHC did not request that. Indeed, there still is no evidence of how much time daily would be reasonably spent in the car to determine how much SHC would be allowable for that task.

The petitioner's attorney submitted post-hearing a brief now stating the request for SHC would be adequate at 10 hours daily. The reason given was to pay for care already being provided as natural supports. It identified that the time would be for eating and related household tasks, toileting, supervision at home and supervision during car travel and in the community. However, it broke that time down without any credible explanation for the time or to show that it is medically necessary for the petitioner. It is absolutely undisputed that this young man has many challenges, and his caregivers are doing an exceptional job at providing his cares. However, when asked what would change for the petitioner, in terms of his care needs, with the additional SHC, no explanation was given except that the time provided

by the family caregivers has been taxing. The information provided to show how the petitioner's caregivers provide his cares in a typical period does not show that there is any medically necessary reason for 24-hour 2:1 care. See Exhibit 5. Further, even with 2:1 care, petitioner is at risk of injury, as given by way of his mother's example of their outing at Lowe's.

Any request for SHC should start with identifying the recipient's specific limitations, explain what particular services are needed to meet those limitations, explain how long it takes to perform each service, and explain the basis for determining why a task would take as long as it does. One would expect that this occurred when the parties determined the number of SHC hours in the first instance using the SHC Assessment Tool. The petitioner may request additional SHC again, or more SDPC, but the justification for the request must be made by showing how petitioner's care needs require it specifically.

Based upon the foregoing, I find that the IRIS agency correctly denied the request for additional SHC. I add, assuming petitioner finds this decision unfair, that it is the long-standing position of the Division of Hearings & Appeals that the Division's hearing examiners lack the authority to render a decision on equitable arguments. See, Wisconsin Socialist Workers 1976 Campaign Committee v. McCann, 433 F.Supp. 540, 545 (E.D. Wis.1977). This office must limit its review to the law as set forth in statutes, federal regulations, and administrative code provisions.

### **CONCLUSIONS OF LAW**

The IRIS agency correctly denied petitioner's request for an additional 17.5 SHC hours.

**THEREFORE, it is**

**ORDERED**

The petition for review herein is dismissed.

### **APPEAL TO COURT**

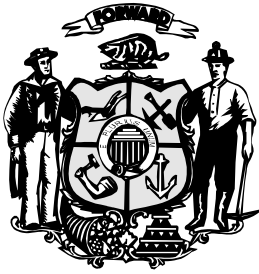
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400. The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 12th day of November, 2014

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\sKelly Cochrane  
Administrative Law Judge  
Division of Hearings and Appeals



**State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on November 12, 2014.

Bureau of Long-Term Support



Attorney Jessica Hutson Polakowski